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No. _____

In The

Supreme Court of the United States

October Term, 1995

CAFE 207, INC., A Florida corporation,

Petitioner,

vs.

ST. JOHNS COUNTY, a political subdivision of the State of Florida,

Respondent.

On Petition For A Writ of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

PETITION FOR A WRIT OF CERTIORARI

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84 pp

QUESTIONS PRESENTED

1. In *Barnes v. Glen Theatre, Inc.*, 501 U.S. 560 (1991), a three-Justice plurality of this Court held that Indiana's anti-nudity statute survived analysis under the test of *United States v. O'Brien*, 391 U.S. 367 (1968), because the Indiana regulation was apparently the least restrictive alternative which would accommodate all legitimate legislative goals, noting that the statute was no more intrusive than necessary because it *did* allow dancing in "pasties and a G-string." The present ordinance goes substantially beyond the restrictions of the Indiana statute, prohibiting not only nudity, but requiring significantly more clothing than pasties and G-strings (*e.g.*, coverage of approximately one-third of the buttocks and one-fourth of the female breasts). In going further than *Barnes* by prohibiting even *non-nude* dancing to this extent, does this ordinance exceed what is permissible under the *O'Brien* test? If not, does the First Amendment impose any objective limits whatsoever on the amount of clothing which a state or local government can compel expressive performers to wear?

2. Where, unlike the circumstances in *Barnes*, both the record and the *face* of an ordinance show that an "anti-nudity/anti-minimal clothing" ordinance is specifically aimed at expressive activities, is enacted for the *predominant* and clearly intended purpose of restricting expressive activities, and that *most* portions of the ordinance are enacted *exclusively* for that purpose, must not such an ordinance be analyzed under the more stringent tests applicable to direct content-based restraints on expression, rather than as an "incidental" restraint on expression?

QUESTION PRESENTED – Continued

3. If, as noted by Justice White for the four dissenting Justices in *Barnes*, a *Barnes*-type anti-nudity law has the *effect* of stifling or altering the content or force of a particular type of non-obscene expressive communication, and has that effect at all times, at all places, and regardless of the manner in which such communications are presented, must not such a law be analyzed under strict scrutiny *regardless* of whether the legislative purpose may be deemed "content-neutral," and regardless of whether such expression may cause any "secondary effects" unrelated to the content of the expression?

4. The *O'Brien* test was first utilized to analyze a law which was enacted for completely content-neutral purposes but which, nonetheless, had an incidental impact upon expression. In contrast, in *Turner Broadcasting System, Inc. v. F.C.C.*, ___ U.S. ___, 114 S.Ct. 2445, 2478 (1994), Justices O'Connor, Scalia, Thomas and Ginsburg acknowledged that a law enacted for *multiple* purposes, some of which are content-based and some of which are content-neutral, should be analyzed under strict scrutiny. Given that the ordinance in this case, unlike the Indiana statute in *Barnes*, was enacted for multiple purposes, some of which were unquestionably content-based, should not its constitutionality be analyzed under strict scrutiny rather than the *O'Brien* test?

5. To the extent that it was the intent of St. Johns County in enacting this ordinance to impose restrictions on one type of expression (*i.e.*, non-obscene, so-called "bar room nude dancing") but to exempt another (*i.e.*, more "mainstream" nude performances), and where the only apparent difference between the benefitted class and the regulated class (both of which involve

QUESTION PRESENTED – Continued

nudity) is the *content* of other aspects of the performance, is this ordinance not, for that reason alone, one which discriminates based on content and, therefore, subject to strict scrutiny on the basis of cases such as *Arkansas Writers' Project, Inc. v. Ragland*, 481 U.S. 221 (1987); *Minneapolis Star & Tribune Co. v. Minnesota Comm'r of Revenue*, 460 U.S. 575 (1983); and *Grosjean v. American Press Co.*, 297 U.S. 233 (1936), as well as unanimous dictum in *Turner Broadcasting*, 114 S.Ct. at 2459 (in contrast to a similar line of cases exemplified by *Leathers v. Medlock*, ___ U.S. ___, 111 S.Ct. 1438 (1991) where discriminations among different media were upheld where the discrimination was not based upon any difference in the *content* of their communications)?

6. In *Barnes*, five members of this Court narrowly upheld Indiana's anti-nudity statute, but could not agree on any particular rationale for doing so. Given the significant confusion which the severely fragmented ruling in *Barnes* has caused legislators, prosecutors, lower courts, and those engaged in live expressive activities, should this Court grant review to resolve the many questions raised and issues left unanswered by the plurality result in *Barnes*, including the primary issue of whether the First Amendment permits government to ban nude or even, as was done here, partially clothed, expressive performances in private or quasi-private settings?

7. Is the County's ban on performances by minimally clothed performers substantially overbroad and subject to facial invalidation for the additional reason that its substantial overbreadth affects the conduct of others not before the court who are unquestionably deterred by the breadth of this ordinance?

QUESTION PRESENTED – Continued

8. Are the ordinance's "safe harbor" exemption provisions impermissibly vague, thereby rendering the ordinance invalid under the test set forth in *Gentile v. State Bar of Nevada*, 501 U.S. 1030 (1991)?

9. While only one member of this Court in *Barnes* found the presence or absence of "secondary effects" to be a necessary element in resolving the validity of an ordinance prohibiting nudity, nonetheless, the vote of that one Justice was critical to obtaining a majority upholding the anti-nudity law challenged in that case. In light of this, did the courts below err in refusing to even *consider* any of the evidence Petitioner had presented on summary judgment re "secondary effects", and in denying Petitioner an opportunity to present further evidence at trial on the question of whether the activities proscribed by the ordinance in *this* case cause the type of "secondary effects" which can justify content-neutral restrictions on speech?

LIST OF PARTIES

All parties of record before the Eleventh Circuit Court of Appeals are set forth in the caption of this petition.

Petitioner Cafe 207, Inc. is not owned by any parent company, nor does it own any non-wholly owned subsidiary company.

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OPINIONS BELOW

The opinion of the United States Court of Appeals is reported as *Cafe 207, Inc. v. St. Johns County*, 66 F.3d 272 (11th Cir. 1995), and is reproduced as Appendix A to this Petition. The opinion of the United States District Court is reported as *Cafe 207, Inc. v. St. Johns County*, 856 F.Supp. 641 (M.D. Fla. 1994), and is reproduced as Appendix B to this Petition.

JURISDICTION

The United States Court of Appeals for the Eleventh Circuit entered its opinion in this case on October 5, 1995. This Court granted Petitioner two extensions of time in which to file this petition. Petitioner has filed this petition within the extension period, which expired on February 15, 1996. This Court therefore has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS AND ORDINANCES INVOLVED

United States Constitution, amendment I:

"Congress shall make no law . . . abridging the freedom of speech, or of the press;. . . . "

The St. Johns County Public Nudity Ordinance (No. 92-12) is reproduced at Appendix C.

STATEMENT OF THE CASE

Statement Of The Facts

In early February, 1992, Petitioner Cafe 207, Inc., opened the first nude erotic dancing business in St. Johns County, Florida, a cabaret known as "Cafe Erotica," which provided nude entertainment by live dancers in conjunction with the sale of food. At no time has Cafe Erotica ever sold any alcoholic beverages.

The opening of Petitioner's restaurant sparked a substantial, and immediate reaction by St. Johns County officials intent upon its closure. At least two of the County's commissioners publicly stated that they intended to close down Cafe Erotica. One of these commissioners thereafter reiterated this statement on the "Sally Jessie Raphael Show," a nationally syndicated television program. At the public hearing which was held on March 18, 1992, which led to adoption of the ordinance, Commissioner Floyd made clear what had motivated the drive to pass this ordinance. Referring specifically to Petitioner's business, Cafe Erotica, he stated:

> "[T]his business is in my front yard. . . . I think I need to make a statement loud and clear to let people know where I stand.
>
> " * * * The question that we have to ask ourselves is whether or not we want to fight now or whether or not we fight later. We should not allow ourselves to be intimidated because of lawsuits or any other thing. ***
>
> "This is like cancer. *** This cancer, what I'm saying is, we need to follow all the due process of law, I understand that, and that's very important. *We don't need to give Cafe Erotica or anyone else a club to hit ourselves on the head.*

> But we will not, and we should not, be intimidated. We must fight for what we want. ***
>
> " . . . [I]f this cancer is allowed to grow, then we're talking about a Cafe Erotica in Ponte Vedra, a Cafe Erotica in St. Augustine Shores, a Cafe Erotica in the Islands of St. Augustine, the St. Augustine South, and it goes on and on and on."

Additionally, the County's Planning Director instructed its Building Department to delay issuance of a building permit to Cafe Erotica, though he thereafter backed down when challenged by one of Petitioner's attorneys. County officials also cited Petitioner for "septic tank violations" even though Petitioner had received the appropriate permit for exactly the same capacity and use only days before the citation issued. During the deliberations which the St. Johns County Commission held over adoption of this ordinance, Petitioner's business was singled out by name for special attention and condemnation by various of the County Commissioners, and Petitioner's was the only business mentioned by name during the County's deliberations. The first draft of the ordinance which (in its final form) is challenged herein was completed by February 24, 1992, within a week or two of the opening of Cafe Erotica.

In short, the record makes clear beyond any doubt that the opening of Petitioner's Cafe Erotica was the primary motivating factor behind the introduction and consideration of the ordinance challenged in this case.

The Relevant Ordinance Provisions

A. The Prohibitory Provisions.

On April 21, 1992, the St. Johns County Commission ultimately adopted Ordinance 92-12 (hereinafter either

"the Ordinance" or "Ord. 92-12"), the 21 page anti-nudity ordinance which is the subject of this action. (A complete copy of Ord. 92-12 is attached hereto in Appendix C.) The primary prohibitory portions of the ordinance are found in §§ 5 and 6. Section 5 prohibits nudity in establishments dealing in alcoholic beverages. Section 6 prohibits nudity in all *other* public places. (As Petitioner's establishment does not involve the sale of alcoholic beverages, the prohibitions of § 5 of the Ordinance are not involved in this petition. Hereafter, any reference to the "invalidity of the Ordinance," or any assertion that the Ordinance is "facially" invalid or "invalid in its entirety," shall be understood as *not* referring to the prohibitions of § 5 of the Ordinance.)

Section 6 of the Ordinance, when read in conjunction with the numerous definitional provisions of § 3 of the Ordinance, prohibits what it defines as "nudity" in public, and §§ 3-h and i of the Ordinance clarify that "nudity" was specifically and expressly intended to be prohibited where engaged in by a performer before a paying audience.

Section 3-f of the Ordinance defines the term "nude" to include any exposure whatsoever of any portion of "the buttocks" or of "the female breasts," as each of those terms is specifically defined in §§ 3 b) and 3 c) of the Ordinance respectively. Those subsections provide the following very unique definitions of the terms "breasts" and "buttocks":

> "Section 3. **DEFINITIONS:** . . .
>
> " . . .
>
> "**b. Breast:** A portion of the human female mammary gland (commonly referred to as the

female breast) including the nipple and the areola (the darker colored area of the breasts surrounding the nipple) and an outside area of such gland wherein such outside area is (i) reasonably compact and contiguous to the areola and (ii) contains at least the nipple and the areola and 1/4 of the outside surface area of such gland.

"c. **Buttocks:** (For a short *general* description see the last sentence of this subsection.) The area at the rear of the human body (sometimes referred to as the gluteus maximus) which lies between two imaginary straight lines running parallel to the ground when a person is standing, the first or top such line being 1/2 inch below the top of the vertical cleavage of the nates (*i.e.*, the prominence formed by the muscles running from the back of the hip to the back of the leg) and the second or bottom such line being 1/2 inch above the lowest point of the curvature of the fleshy protuberance (sometimes referred to as the gluteal fold), and between two imaginary straight lines, one on each side of the body (the "outside lines"), which outside lines are perpendicular to the ground and to the horizontal lines described above and which perpendicular outside lines pass through the outermost point(s) at which each nate meets the outer side of each leg. Notwithstanding the above, Buttocks shall not include the leg, the hamstring muscle below the gluteal fold, the tensor fasciae latae muscle or any of the above-described portion of the human body that is between either (i) the left inside perpendicular line and the left outside perpendicular line or (ii) the right inside perpendicular line and the right outside perpendicular line. For the purpose of the previous sentence the left inside perpendicular line shall

be an imaginary straight line on the left side of the anus (i) that is perpendicular to the ground and to the horizontal lines described above and (ii) that is 1/3 of the distance from the anus to the left outside line, and the right inside perpendicular line. (The above description can *generally* be described as covering 1/3 of the buttocks centered over the cleavage for the length of the cleavage.)"

B. The Exceptions.

Public nudity is treated as a second degree misdemeanor. Section 7(b) provides a general exemption, without further elaboration, for nudity in the context of performances, where such nudity "can not legally be prohibited," either: (i) because "it constitutes a part of a *bona fide* live communication . . . or performance by a person wherein such nudity is expressive conduct *incidental to and necessary for* the conveyance or communication of a *genuine* message . . . and is not a mere guise or pretense utilized to exploit the conduct of being nude for profit or commercial gain"; or (ii) because it "is otherwise protected by the United States or Florida Constitution." Ord. 92-12, § 7(b). Emphases added.

C. Statements of Purpose.

In the various "whereas" clauses at the beginning of the ordinance, the County articulated its purported purposes in enacting this ordinance. Certain of these "whereas" clauses make clear that the ordinance was adopted with commercial nude dancing as its primary target. A few of these statements of purpose are set forth below verbatim:

"n) WHEREAS, a requirement that dancers don opaque covering sufficient to cover the Buttocks and the Breasts as such portions of the human anatomy are defined in this ordinance does not deprive the dance of whatever erotic message, if any, it may convey, but simply makes such message, if any, slightly less graphic and imposes only an incidental limitation on the message; and,

" . . .

"r) WHEREAS, the Board finds and determines that the average person applying contemporary St. Johns County community standards would find that the public nudity prohibited by this ordinance, if allowed, when taken as a whole (i) appeals to the prurient interests and (ii) lacks serious literary, artistic, political, and scientific value; and,

"s) WHEREAS, non regulation of persons appearing nude in Public Places within St. Johns County encourages commercial Entities and other Entities and Persons to advertise outside of St. Johns County and the State of Florida by billboard, radio, print and other media the availability of nudity in Public Places within St. Johns County and thus encourages the influx into St. Johns County of Persons seeking (i) to observe and/or participate in such nudity and (ii) to participate in the disorderly, harmful, and illegal conduct that is associated therewith, thereby increasing injuries and damages to the citizens of this County who will be victims of such increased disorderly, harmful, and unlawful conduct; and,

"t) WHEREAS competitive commercial advertising and/or exploitation of nudity

> encourages escalation of Nude and lewd conduct within the competing commercial establishments exploiting such conduct and thereby increases the adverse effects upon public order and the public health;. . . . "

Paragraph "q)" of the whereas clauses of the ordinance also clarifies that the Commission strongly favored certain types of entertainment over the type of entertainment presented in establishments such as Petitioner's:

> "q) WHEREAS, St. Johns County is a county that is, and desires very much to continue to be, a community that contains and is known for traditional wholesome public recreation activities and historic facilities such as: . . . the golf Tournament Players Championship; the international headquarters and facilities of the Association of Tennis Professionals; and the future home of the PGA Tour Hall of Fame; . . . "

The Florida State Anti-Nudity Statute

At the time Respondent enacted its anti-nudity ordinance, the State of Florida already had a statute addressing similar conduct. Florida Statutes § 800.03 (1991) provided (and still provides):

> "**Exposure Of Sexual Organs.** – *It shall be unlawful for any person* to expose or exhibit his sexual organs in any public place . . . in a vulgar or indecent manner, or so to expose or exhibit his person in such place or *to go or be naked in such place*. Provided, however, this section shall not be construed to prohibit the exposure of such organs or the person in any place provided or set apart for that purpose. Any person convicted of a violation hereof shall be guilty of misdemeanor of the first degree. . . . " (Emphasis added.)

Impact Of The Ordinance

As a result of the passage of the Ordinance, Petitioner's erotic dancers have ceased wearing anything less than bikini bathing suits, and the message inherent in their erotic performances has been significantly diluted, if not effectively stifled.

Statement Of Proceedings And Dispositions In The Courts Below

A. The District Court Proceedings.

Petitioner filed its Verified Petition for Temporary Injunction, Permanent Injunction, Declaratory Judgment and Supplemental Relief on April 22, 1992, asserting that Ordinance 92-12 is unconstitutional on its face, in violation of the Free Speech, Due Process and Equal Protection guarantees of the First and Fourteenth Amendments to the United States Constitution. Accordingly, the district court had proper jurisdiction over this matter pursuant to the "federal question" jurisdiction conferred by 28 U.S.C. § 1331.

A preliminary injunction hearing was held on April 29, 1992. The District Court entered its Order Denying Preliminary Injunction on May 18, 1992. Petitioner appealed this decision on an interlocutory basis. The Court of Appeals for the Eleventh Circuit upheld the denial of the preliminary injunction finding no abuse of discretion, but declined to reach the merits of the case. *Cafe 207, Inc. v. St. Johns County*, 989 F.2d 1136 (11th Cir. 1993).

Following reactivation of the case, the district court allowed limited discovery to determine the County's factual basis for the Ordinance. The Court did not conduct

any further evidentiary hearings, but permitted both parties to file supplemental memoranda regarding the alleged adverse secondary effects of public nudity. The parties both submitted controverting evidence on the "secondary effects" issue. The Court entered Summary Judgment against Petitioner in a Memorandum Opinion dated June 22, 1994, although, at the time it did so, it did not yet have before it a transcript (which had not yet been completed) of a previously taken deposition wherein Petitioner's expert provided further evidence regarding the lack of any "secondary effects." The District Court ruled that the possible presence of controverting evidence on the "secondary effects" issue was irrelevant as a matter of law, and, accordingly, that Petitioner would not be allowed a trial where all conflicting evidence on "secondary effects" could be considered. 856 F.Supp at 645. The District Court believed that, under the plurality result in *Barnes*, "[e]vidence about secondary effects or, rather, the lack of them, is . . . clearly foreclosed." *Id.*

Concluding that a trial was not necessary, the District Court then addressed the merits of Petitioner's challenges. Initially, the court concluded that the current ordinance should be analyzed under the four-part test of *United States v. O'Brien*, as was the Indiana law in *Barnes*, even though it was clear from the record in this case that the present ordinance, unlike the state law in *Barnes*, was indeed content-based, having been enacted, at least in part, for the clear purpose of restricting erotic dance performances in commercial establishments.

Analyzing the ordinance under the *O'Brien* test, the court held that it need not analyze whether the clothing restriction in this case is the least restrictive alternative that will satisfy the County's purposes (856 F.Supp. at

646); instead, it simply concluded that the clothing restriction in this case was not so far beyond that upheld in *Barnes* as to present any constitutional problem. However, the court declined the opportunity to clarify where the line is, if anywhere, beyond which lawmakers may not go in requiring clothing by performers. *A fortiori*, the court avoided the more difficult task of articulating any principled basis for establishing such a line.

The District Court also rejected Petitioner's claims that the ordinance was substantially overbroad in its impact upon others not before the court. (856 F.Supp. at 647.) The court ruled that any statutory overbreadth was not substantial, particularly given the exemptions in Section 7 of the ordinance, and therefore concluded that plaintiff lacked standing to challenge the ordinance on that basis. *Id.* at 648.

The District Court also rejected Petitioner's claims that the ordinance's exemptions were too vague and, in turn, rendered the prohibitory scope of the underlying ordinance impermissibly vague. 856 F.Supp. at 649-650. The court was not troubled by the fact that the ordinance exempted all dancing performances which are "protected by the United States or Florida Constitution," even though this Court, in *Barnes* and many prior decisions, had unambiguously stated that all non-obscene nude dancing is entitled to at least *some* First Amendment protection, and even though the District Court did not provide any suggested test for distinguishing between constitutionally protected and constitutionally unprotected nude dancing.

Finally, the District Court rejected Petitioner's argument that the ordinance discriminated "between topless dancing in a bar and topless dancing in the 'legitimate'

theater. . . . " *Id.* at 650. The District Court alternatively read *Barnes* as stating either that topless dancing in a bar has *no* constitutional protection, or has less protection than topless dancing in the "legitimate" theater. Based on this perceived distinction in the content of these two types of nude performance, and notwithstanding the fact that no alcohol is served at Petitioner's establishment, the court found that the admittedly discriminatory treatment did not render the ordinance unconstitutional. Petitioner filed a timely notice of appeal on July 19, 1994.

B. The Proceedings In The Court Of Appeals.

The Court of Appeals exercised its jurisdiction over Petitioner's appeal pursuant to the provisions of 28 U.S.C. § 1291, as an appeal of right from a final judgment of a district court of the United States.

Following extensive briefing and extensive oral argument, the court of appeals affirmed the judgment of the district court in a one sentence published opinion which merely adopted the published opinion of the district court below.

REASONS FOR GRANTING THE WRIT

In *Barnes v. Glen Theatre, Inc.*, 501 U.S. 560 (1991), five members of this Court, in three separate and conflicting opinions, upheld Indiana's 19th century general public nudity law as challenged by the owners of two exotic dancing establishments. While eight of the nine Justices agreed that even nude exotic dancing, such as was exhibited at the Petitioners' establishments, was entitled to some degree of First Amendment protection, the five

Justices upholding this 19th century state statute of general application did not view it as a direct content-based restraint upon expression. Chief Justice Rehnquist, speaking as well for Justices O'Connor and Kennedy, concluded that the state's general anti-nudity law was a law of general application not particularly aimed or directed at speech activities and, as such, was not subject to the level of heightened scrutiny applicable to content-based restraints upon expression. Instead, the Chief Justice expressed the belief that the appropriate standard of review for such a statute of general application would be under the four-part test of *United States v. O'Brien*, 391 U.S. 367 (1968).

Justice Souter, in a separate concurring opinion, agreed with the Chief Justice that even nude dancing of the type presented by the record in *Barnes* was within the limits of First Amendment protection, agreed that Indiana's 19th century anti-nudity law was not enacted as an intentional restriction on speech activities, and that it was thus subject to the intermediate scrutiny of *O'Brien*, reserved for content-neutral laws of general application which have an incidental, though direct, impact in restraining expression.

The primary difference between the opinions of the Chief Justice and of Justice Souter came in evaluating the third prong of the *O'Brien* test, *i.e.*, the legitimacy of the purported state interest in enacting the law. The Chief Justice, speaking only for himself and two other Justices, concluded that a societal interest in protecting a legislative concept of "morality" was a sufficient governmental interest to justify a restriction on expression under the *O'Brien* test. Justice Souter, and by necessary implication, the four dissenting Justices, rejected that notion. Instead,

Justice Souter borrowed a concept from this Court's "time, place, or manner" jurisprudence, judging the legitimacy of the state's interest by whether the expressive activity resulted in presumed "harmful secondary effects" unrelated to the content of the expression. No other member of the Court concurred in this use of "secondary effects." However, because Justice Souter's opinion has been viewed by many lower courts as the narrowest of the opinions in *Barnes* supporting the judgment, it has frequently been cited by the lower courts, rightly or wrongly, as representing the holding of this Court in *Barnes* under the test of *Marks v. United States*, 430 U.S. 188 (1977).[1]

The final member of this Court who voted to uphold the Indiana law was Justice Scalia. He traced the Indiana law to its 1831 origin to support his conclusion that it was not content based. He then articulated the novel view that incidental restraints on expression (of *any* type) should only be analyzed on a "rational basis" test, rather than the intermediate scrutiny of *O'Brien*.

In sharp contrast, the four dissenting Justices voted to strike down the law under a test of strict scrutiny, concluding that the statute was not truly a law of "general application" because there were many types of nudity which were not made criminal. They also expressed a basic disagreement concerning whether

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[1] *See, e.g., Triplett Grille, Inc. v. City of Akron*, 40 F.3d 129, 133 (6th Cir. 1994); *International Eateries of America, Inc. v. Broward County*, 941 F.2d 1157, 1160-61 (11th Cir. 1991); *S.B.C. Enterprises, Inc. v. City of South Burlington*, 892 F.Supp. 578, 582 (D.Vt. 1995); *Fond Du Lac County v. Mentzel*, 195 Wis.2d 313, 325-326, 536 N.W.2d 160, 165 (Wis.App. 1995).

nudity is a substantial component of the message communicated in an exotic dancing performance. "It is only because nude dancing performances may generate emotions and feelings of eroticism and sensuality among the spectators that the State seeks to regulate such expressive activity . . . . " 501 U.S. at 592. "The nudity is itself an expressive component of the dance, not merely incidental 'conduct.' " *Id.*

A. Certiorari Should Be Granted To Resolve An Important Issue Of Federal Law Not Before This Court In *Barnes*, And To Resolve A Conflict Between The Court Of Appeals Below And A State Court Of Last Resort, In Determining Whether Local Anti-Nudity Ordinances Aimed Specifically, Though Not Exclusively, At Performance-Oriented Establishments Are, At Least In Part, Content-Based Or Are Entirely Content-Neutral.

The present case involves an ordinance which significantly differs from the state anti-nudity law in *Barnes* in a number of key respects. First, unlike the 19th century anti-nudity law at issue in *Barnes*, the ordinance in the present case supplemented an already existing state anti-nudity statute[2], and the record makes clear beyond any doubt that it was passed solely as a direct reaction to the opening of Petitioner's nude dancing establishment. Indeed, the various "purpose" clauses on the *face* of the challenged ordinance clarify what is otherwise obvious

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[2] As set forth *supra* at 9, the Florida statute makes it a misdemeanor "to go or be naked in [any public] place." The County, concerned that state authorities had not construed that statute as a tool for prosecuting non-obscene nude performances before consenting adults, decided that the Ordinance was necessary to fill this perceived gap.

from the record, *i.e.*, that this ordinance was very much targeted at expressive activities, though it ultimately was drafted in such a way as to include certain non-expressive nudity. That purpose is also reflected in the Ordinance's prohibitory sections (in both §§ 5 *and* 6) and the exemptions of § 7. Under these circumstances, this case presents the novel question, not presented in *Barnes*, of whether a law very much enacted for the purpose of restricting expressive activities should be viewed simply as a law having an "incidental" content-neutral impact upon expression or whether, instead, it should be subjected to this Court's traditional strict scrutiny reserved for laws enacted for content-based purposes.

This is also a particularly pertinent question at this point in this Court's jurisprudence given that most of the members of this Court recently, in *Turner Broadcasting System, Inc. v. F.C.C.*, ___ U.S. ___, 114 S.Ct. 2445 (1994), endorsed the principle that if a content-based purpose appears *on the face* of a statute, the statute, at least to that extent, should be judged based on strict scrutiny, notwithstanding its assertion of other content-neutral purposes which it may in fact serve.[3]

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[3] As stated in the concurring and dissenting opinion of Justices O'Connor, Scalia, Ginsburg and Thomas in *Turner Broadcasting*:

> "[W]hen a content-based justification appears on the statute's face, we cannot ignore it because another content-neutral justification is present." 114 S.Ct. at 2478.

The decision of the two lower federal courts in this case is also in conflict with the decision of the Supreme Court of South Carolina which found a very similar local anti-nudity ordinance to be content-based and therefore not subject to an *O'Brien* analysis. In *Connor v. Town of Hilton Head Island*, 442 S.E.2d 608 (S.C. 1994), the South Carolina Supreme Court struck down the anti-nudity ordinance of the Town of Hilton Head Island, where the court concluded that Hilton Head's anti-nudity ordinance was not "unrelated to the suppression of free expression" because the "Town's ban on nudity is directly related to the suppression of nude dancing *which it specifically targets.*" *Id.* at 610 (emphasis added). Similarly here, the St. Johns County ordinance *specifically targets nude dancing* and such concern was the clear and predominant, though not exclusive, focus of the ordinance.

Accordingly, this Court should grant review herein to resolve the question left unanswered in *Barnes*, *i.e.*, whether an anti-nudity ordinance which specifically and predominantly targets nude *dancing* should be viewed as a content-based, or a content-neutral, restriction on expression?

> "[W]e have never held that the presence of a permissible justification lessens the impropriety of relying in part on an impermissible justification." *Id.*

C.f. Justice Kennedy's opinion for the majority, stating:

> "Nor will the mere assertion of a content-neutral purpose be enough to save a law which, *on its face*, discriminates based on content." 114 S.Ct. at 2459 (emphasis added).

B. Certiorari Should Be Granted To Resolve A Conflict Between The Opinion Of The Court Of Appeals And This Court's Decisions In *Arkansas Writers Project, Inc. v. Ragland*, *Minneapolis Star & Tribune Co. v. Minnesota Comm'r of Revenue*, *Grosjean v. American Press Co.*, and *Turner Broadcasting System, Inc. v. F.C.C.*, To The Extent That The Opinion Of The Court Of Appeals Upholds, And This Court's Decisions Strike Down, Laws Which Impose Differential Restrictions Upon Speakers, Depending Upon The *Content* Of Their Constitutionally Protected Communications.

Another significant difference between this case and *Barnes* is that St. Johns County at least *attempted* to provide an exemption for the type of nude performances which some courts have referred to as "high culture." *Triplett Grille, Inc. v. City of Akron*, 40 F.3d 129, 136 (6th Cir. 1994). Section 7(b)(ii), of the Ordinance exempts all nude dancing which is "otherwise protected by the United States or Florida Constitution." However, in denying injunctive relief to Petitioner, the courts below were obviously of the belief that the legislative intent was *not* to similarly exempt the dancing at Petitioner's establishment.

While Petitioner believes that the exemption provided in the Ordinance is too vague to accomplish its obviously intended purpose, assuming, as did the Court of Appeals below, that it *does* accomplish that purpose, this case then presents the following additional issue not present in *Barnes*: "Where 'high brow' nude performances[4], are exempted from the scope of an anti-nudity

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[4] *E.g.*, The Ballet Africains, Hair, Equus, Oh! Calcutta, occasional lesser-known performances of the New York City Ballet, etc.

ordinance, but non-obscene dances performed by exotic dancers *are* subjected to the requirements of that ordinance, does such an ordinance constitute an impermissible *content-based discrimination* between two different types of constitutionally protected nude expression and, if so, is it not subject to invalidation under the test of strict scrutiny this Court employed in *Arkansas Writers Project, Inc. v. Ragland*, 481 U.S. 221 (1987); *Minneapolis Star & Tribune Co. v. Minnesota Comm'r of Revenue*, 460 U.S. 575 (1983); and *Grosjean v. American Press Co.*, 297 U.S. 233 (1936)?" As this Court recently acknowledged in *Turner Broadcasting System, Inc. v. F.C.C.*, ___ U.S. ___, 114 S.Ct. 2445, at 2459 (1994):

> "Our precedents thus apply the most exacting scrutiny to regulations that suppress, disadvantage, or impose differential burdens upon speech because of its content."

To the extent that future anti-nudity ordinances attempt to follow the lead of St. Johns County in providing exemptions for "high-culture" nude performances, the courts below will be incapable of determining, on any principled basis, whether such content-based discriminations are permissible absent guidance from this Court. Given that this issue was not before this Court in *Barnes*, given that there is a conflict between the Court of Appeals' opinion below and a substantial number of this Court's prior decisions involving content-based discriminations, and given the frequency with which this issue will likely recur in the future, it is respectfully submitted that there is a compelling reason for this Court to accept review of this case in order to provide much needed guidance to the state and lower federal courts.

C. Certiorari Should Be Granted To Provide Much Needed Guidance To All State And Federal Courts Concerning Whether The First Amendment Allows Ordinances Or Laws Totally Prohibiting Nude Performances In All Contexts, And, If So, Whether, And On What Basis, There Is Any First Amendment Limit To How Far Such Regulations May Go In Terms Of The Amount Of Clothing That May Be Required Of A Performer Engaged in Otherwise Protected Expression.

The third key difference between the present ordinance and the Indiana anti-nudity statute in *Barnes* is that the Indiana statute merely required coverage only of the parts of the body which, in our current society, are truly "private," *i.e.*, the parts of the body that are not commonly viewable at many of our nation's public beaches or on broadcast television. Under the Indiana statute, there was no violation if the cheeks of one's buttocks or the sides of one's breasts were exposed, so long as their truly private parts, *i.e.*, the genitals, pubic area, etc., as well as the nipples of the female breast, remained covered. The Indiana regulation was consistent with generally accepted mores as evidenced not only by our nation's beaches and its television programming, but in the covers of magazines on display in nearly every supermarket in America.

.... In obvious recognition of this fact, the opinion of the Chief Justice in *Barnes* (which was premised on the state's interest in preserving public morality) acknowledged that the Indiana statute allowed "dancers [to] wear at least pasties and a G-string," and that that statutory requirement was "the bare minimum necessary to achieve the state's purpose." 111 S.Ct. at 2463. By requiring a *greater* amount of clothing than that in *Barnes*, the ordinance at

bar requires covering of areas which, in our society, are clearly no longer "private," is not the "bare minimum necessary to achieve the state's purpose," and is obviously "greater than is essential to the furtherance of [the governmental] interest" (*Barnes, supra*, 111 S.Ct. at 2461, quoting from *O'Brien*, 391 U.S. at 377).

If a majority of this Court ultimately concludes that the Constitution allows local government to impose clothing restrictions on performers based on perceived public mores, it will obviously be imperative on this Court to establish a constitutional test to give guidance to lower courts in terms of the *amount* of clothing that local government may constitutionally compel performers to wear. While petitioners do not believe that *any* clothing requirement is consistent with First Amendment guarantees where a non-obscene performance takes place before a willing audience of consenting adults in a properly regulated establishment, should a majority of this Court feel otherwise, it will spawn endless litigation in the lower courts if the Court does not provide those courts with constitutional guidance in how to go about conducting a principled analysis for analyzing whether a legislative "clothing requirement" exceeds constitutional boundaries under the First Amendment.

D. Certiorari Should Be Granted To Resolve A Conflict Between The Circuits Concerning The Extent Of Overbreadth Which Must Be Present In An Anti-Nudity Ordinance Before Such An Ordinance Will Be Found "Substantially Overbroad" And Subject To Facial Invalidation On That Ground.

Justice Souter, in his separate concurring opinion in *Barnes*, was the only member of this Court to conclude that a restriction on nude expression could be justified if

there were proof that such an ordinance would "further the State's interest in avoiding harmful secondary effects . . . . " 501 U.S. at 585, n.2. However, he also suggested that it would be hard to see how such an ordinance could be upheld if applied to "classes of productions that could not readily be analogized to the adult films at issue in *Renton v. Playtime Theatres, Inc.*, 475 U.S. 41 (1986)." Because the four dissenting Justices in *Barnes* would have stricken the Indiana Anti-Nudity Statute as challenged on First Amendment grounds by the plaintiffs therein, Justice Souter's reservations, coupled with his observation in that same footnote that "there is no overbreadth challenge before us" (*id.*) has, not surprisingly, resulted in a split in the federal circuits concerning whether a general anti-nudity ordinance would be valid if challenged on First Amendment grounds of substantial overbreadth.

In *Triplett Grille, Inc. v. City of Akron*, 40 F.3d 129 (6th Cir. 1994), the Court of Appeals upheld a substantial overbreadth challenge to an anti-nudity ordinance as asserted by a nightclub which featured nude exotic dancing. Relying on this Court's various opinions recognizing, in First Amendment cases, the right to present facial challenges asserting the rights of others not before the Court[5], the Sixth Circuit Court of Appeals recognized

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[5] Quoting from this Court's decision in *City Council of Los Angeles v. Taxpayers For Vincent*, 466 U.S. 789, 801 (1984), the *Triplett* opinion noted:

> "A plaintiff may prevail on a facial attack by demonstrating that there is 'a realistic danger that the statute itself will significantly compromise recognized First Amendment protections of parties not before the Court.' " 40 F.3d at 135.

standing by the plaintiff in that case to assert the rights of others who would exhibit nudity in the context of "'high-culture' entertainment" (40 F.3d at 136), and concluded that, under Justice Souter's test in *Barnes*, it was not reasonable to conclude that such performances would necessarily or likely result in any "harmful secondary effects." *Id.* On that basis, the court struck down that ordinance on its face, leaving it for local officials to attempt to redraft it more narrowly.

In contrast, the Eleventh Circuit decision below, adopting the opinion of the district court, rejected a comparable claim made by Petitioner (856 F.Supp. at 647-649), relying on the Ordinance's questionable exemption for undefined nude performances which are "constitutionally protected" as the basis for rejection of Petitioner's overbreadth claim. While the vagueness of that exemption is discussed herein as a separate basis for grant of review, this Court should, in any event, grant review to clarify whether, and under what circumstances, such ordinances are subject to "substantial overbreadth" challenge. Besides the opinion of the Sixth Circuit in *Triplett*, a similar conclusion of substantial overbreadth was reached by the Wisconsin Court of Appeals in *Fond Du Lac County v. Mentzel*, 195 Wis.2d 313, 536 N.W.2d 160 (Wis.App. 1995).

E. Certiorari Should Be Granted To Resolve An Issue Which Was Not Settled By This Court In *Barnes*, And To Resolve A Conflict Between The Court Of Appeals Below And The Courts Of Last Resort Of Two States, Concerning Whether *Barnes* Requires Employment Of Least-Restrictive Means Analysis When Analyzing An Ordinance Which Specifically Targets Nude Dancing.

To the extent the Court of Appeals and District Court below upheld an ordinance which required expressive

dancers to wear more clothing than required by the anti-nudity statute upheld in *Barnes*, they are in conflict with the decision of the South Carolina Supreme Court in *Connor v. Town of Hilton Head Island, supra*, which found unconstitutional under *Barnes*, and under the least restrictive alternative requirement of *O'Brien*, a Hilton Head ordinance which prohibited not only truly nude performances, but also performances where one wears "clothing that covers . . . the genitals, pubic region, and areolae of the female breasts." 442 S.E.2d at 610, n.3. Similarly, in *Pel Asso, Inc. v. Joseph*, 362 Ga. 904, 905-906, 427 S.E.2d 264, 265-266 (Ga. 1993), the Georgia Supreme Court also employed least restrictive means analysis in striking down a municipal anti-nudity ordinance.

In contrast, the courts in the case at bar did *not* analyze whether the County's clothing requirement was "greater than essential" for accomplishment of any legitimate and substantial County interests.

In the context of true time, place, or manner ordinances, this Court has concluded that "least restrictive alternative" analysis is not constitutionally required, only "narrow tailoring." *Ward v. Rock Against Racism*, 491 U.S. 781 (1989). Similarly, in *Renton v. Playtime Theatres, Inc.*, 475 U.S. 41 (1986), and again in the Chief Justice's plurality opinion in *Barnes*, this Court stated that the "time, place, or manner" test "has been interpreted to embody *much the same standards* [though not *precisely* the same standards] as those set forth in *United States v. O'Brien*." 111 S.Ct. at 2460 (emphasis added). However, no majority of this Court has ever diluted the fourth prong of the *O'Brien* test in any case where both the legislatively targeted activity and the assertedly protected activity

involved direct, pure speech, as opposed to symbolic speech.

Accordingly, this Court should grant review to determine whether, in a "pure speech" case, the courts below were incorrect in implicitly concluding that the *O'Brien* test (assuming *arguendo* it would apply here at all), has now been diluted to require only "narrow tailoring" under its fourth prong rather than the traditional requirement that the restraint on expression be "no greater than is essential to the furtherance of [the governmental] interest." *Barnes, supra,* 111 S.Ct. at 2461, quoting from *O'Brien, supra,* 391 U.S. at 377.

F. Given The Lack Of Any Majority Opinion In *Barnes*, And The Resultant Proliferation Of Badly Split Lower Court Decisions In This Area, Review Should Be Granted If For No Other Reason Than To Clarify Whether Proof Of "Secondary Effects" Has Any Relevance In Analysis Of An Anti-Nudity Ordinance.

In *Barnes*, only one member of this Court, Justice Souter, concluded that the restraint on expression involved in that case could be justified if it was found that the restriction was necessary to prevent "secondary effects" unrelated to the content of the nude dance performance. While this Court has employed the "secondary effects" test since *Renton* to justify time, place, and manner restrictions, no other member of this Court has ever advocated its use to uphold direct restraints which prohibit a particular type of expression at all times, in all

places, and in all manners.[6] Given that *all* controversial speech is likely to have *some* "adverse secondary effects," Petitioner respectfully submits that this Court has always wisely avoided attempting to justify restraints on expression based upon the fact that legitimate expression may in fact result in provable harmful secondary effects unrelated to the content of the expression.[7]

However, given that Justice Souter's opinion in *Barnes* has been repeatedly construed to be the most narrow opinion in that case upholding the judgment, numerous lower courts have considered it controlling and have applied a "secondary effects" analysis in upholding or rejecting similar ordinances around the Country.[8]

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[6] In fairness to Justice Souter's position, there was certainly a stronger argument for use of "secondary effects" in analysis of the arguably content-neutral statute before this Court in *Barnes* than there would be in analyzing the content-*based* ordinance in *this* case, which *specifically* targets nudity *in the context of expressive dancing activities*.

[7] For example, if "adverse secondary effects" could justify restrictions on the content of expression, the anti-segregation demonstrations of the '50s and '60s would surely have been proscribable by constitutionally sound ordinances, as there were frequently adverse secondary effects which accompanied such expression, such as increased traffic congestion, disturbances of the peace, batteries upon marchers, etc. For similar reasons, this Court has *never* allowed secondary effects to justify restraints on protected expression. *See, e.g., Brandenburg v. Ohio*, 395 U.S. 444 (1969); *Hess v. Indiana*, 414 U.S. 105, 108-109 (1973); *Cantwell v. Connecticut*, 310 U.S. 296 (1940); *Hague v. C.I.O.*, 307 U.S. 496 (1939); and *Terminiello v. City of Chicago*, 337 U.S. 1 (1940).

[8] *See, e.g.*, cases cited in n. 1, *supra*.

Accordingly, if for no other reason, this Court should grant review to clarify the issue which was before this Court, but unanswered, in *Barnes*, *i.e.*, whether proof of "secondary effects" has any relevance in analysis of an anti-nudity ordinance, particularly where, as here, and unlike *Barnes*, such an ordinance is a *direct* restraint against specifically targeted expressive activities.

G. Certiorari Should Be Granted To Resolve Whether An Exemption For "Constitutionally Protected" Nude Performances Is Impermissibly Vague, Particularly Given The Views Of A Majority Of This Court In *Barnes* That Even Nude Bar Room Dancing Is Entitled To *Some* Constitutional Protection; Review Should Also Be Granted To Resolve A Conflict Between The Opinion Of The Court Of Appeals Below And This Court's Opinion In *Gentile v. State Bar of Nevada*, Concerning The Impact Of Vague Exemption Provisions Upon Laws Which Impose Restrictions Upon Expressive Activities.

Finally, review should also be granted because the Ordinance in this case has a certain feature which provides this Court with a rare opportunity to articulate a much-needed test for use by the lower courts in determining whether live nude performances are or are not protected against direct restraints by local government.

Specifically, the Ordinance in this case contains an exemption for all nude dancing which is "otherwise protected by the United States . . . Constitution." § 7(b)(ii). There are at least three different ways this Court could deal with that feature, any one of which would provide substantial and much-needed guidance to the lower courts who have been forced to wrestle with these issues without a principled basis for decision-making.

First, the Court could conclude that nude exotic dancing comes within the ambit of the § 7(b)(ii) exemption and, accordingly, Petitioner was entitled to an injunction against enforcement of the ordinance. Such a conclusion would be consistent with the determination by eight members of this Court in *Barnes* that even nude dancing performed in an exotic dancing establishment is entitled to *some* amount of First Amendment protection. Given the fact that the present ordinance, unlike the ordinance in *Barnes*, constitutes a direct, rather than an *incidental*, restraint on expression, this Court could rule, entirely consistent with its judgment in *Barnes*, that, given the different nature of the ordinance in *this* case, the very same conduct which was prohibitable by the arguably content-*neutral* statute in *Barnes* is *not* prohibitable by the clearly content-*based* ordinance in the present case.

The second possible resolution is that this Court could conclude that the exemption for nude dancing which is "otherwise protected by the United States . . . Constitution" is impermissibly vague in the absence of standards on the face of the ordinance to guide enforcement officials. *See, e.g., Kolender v. Lawson*, 461 U.S. 352, 358-360 (1983).

Third, this Court could, alternatively, attempt to fashion a definitive constitutional test for determining the extent of constitutional protection which does or does not attach to nude dancing of the type involved in the present case. Of course, any such test would not only have to articulate a usable explanation of any "contextual" elements, but would also have to articulate where (or how) the constitutional line would be drawn in terms of the

amount of clothing which could constitutionally be mandated for performers.

Finally, the opinions below are also in conflict with this Court's opinion in *Gentile v. State Bar of Nevada*, 501 U.S. 1030 (1991), which held that where the exemptions to a law which restricts speech activity are sufficiently unclear as to cause persons who may wish to express themselves to shy away from the line separating protected and unprotected expression, the underlying law itself is unenforceable and unconstitutional. Here, Petitioner would want its dancers to modify their performances in whatever way would be necessary to fall under the exemption of § 7(b)(ii). However, because neither the Ordinance, this Court in its prior decisions, nor the two federal courts below, has yet attempted to provide any clear guidelines for determining the criteria which would cause a nude performance to be immune from state or local prohibitions, it is impossible for Petitioner's dancers to prospectively conform their conduct to this hopelessly vague standard. As a result, for all the same reasons as given in *Gentile*, the underlying ordinance must be found facially invalid under the First Amendment.

CONCLUSION

For all the reasons above, the state and lower federal courts, in the wake of this Court's badly fragmented ruling in *Barnes*, are utterly without guidance in analyzing the numerous cases which are coming before them with ever-increasing frequency involving municipal attempts to impose minimum clothing requirements on those engaged in First Amendment protected expressive activities. Regardless of whether this Court deems this

issue to be the most important constitutional issue of the day, the plain fact is that it is an issue which is recurring with great frequency and which, absent some guidance from this Court, will surely monopolize an undue amount of the time of the federal court system. For all these reasons, it is respectfully submitted that this Court should grant review and attempt to clarify some of the many questions left unanswered by its opinion in *Barnes*, as well as many of the questions not presented in *Barnes*, but which have been suggested by the Court's ruling in that case.

Respectfully submitted,

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APPENDIX A

CAFE 207, INC., a Florida corporation, Plaintiff-Appellant.

v.

ST. JOHNS COUNTY, a political subdivision of the State of Florida, Defendant-Appellee.

No. 94-2897.

United States Court of Appeals, Eleventh Circuit.

Oct. 5, 1995.

Appeal from the United States District Court for the Middle District of Florida (No. 92-390-Civ-J-10). William Terrell Hodges, Judge.

Before TJOFLAT, Chief Judge, DYER and GARTH* Senior Circuit Judges.

PER CURIAM:

We affirm the judgment of the district court for the reasons stated in its dispositive memorandum opinion reported at 856 F.Supp. 641 (M.D.Fla.1994).

AFFIRMED.

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* Honorable Leonard I. Garth, Senior U.S. Circuit Judge for the Third Circuit, sitting by designation.

APPENDIX B

CAFE 207, INC., Plaintiff,

v.

ST. JOHNS COUNTY, Defendant.

No. 92-390 CIV-J-10.

United States District Court,
M.D. Florida,
Jacksonville Division.

June 23, 1994.

Gary S. Edinger, Hankin, Beverly & Edinger, P.A., Gainesville, FL, for plaintiff.

James G. Sisco, St. Johns County Attys. Office, St. Augustine, FL, for defendant.

MEMORANDUM OPINION

HODGES, District Judge.

This is an action for declaratory and injunctive relief in which the Plaintiff challenges the constitutionality of the St. Johns County Public Nudity Ordinance. There is no dispute concerning the court's jurisdiction over the parties or the subject matter. The case is before the court on the parties' cross motions for summary judgment. The ordinance is constitutional and the Defendant's motion for summary judgment will be Granted.

In February, 1992, the Plaintiff opened and began operating a restaurant in St. Johns County, Florida, known as the Cafe Erotica. The restaurant provides nude

entertainment by live dancers in conjunction with the sale of food. No alcoholic beverages are served. The Plaintiff alleges that the nude dancing performed for its patrons is non-obscene, constitutionally protected communication; that the nude human body is a thing of beauty which, when combined with music and rhythmic motion in the form of dance, conveys an "important message of eroticism." The Plaintiff also claims that its promotion of nude dance and eroticism is, in part, a deliberate and intentional political protest against those who would choose to impose their narrow view of morality through legislation.

On April 21, 1992, St. Johns County passed its Ordinance 92-12 entitled the St. Johns County Public Nudity Ordinance. The legislation recites, among many other findings, that St. Johns County is essentially a rural-suburban community, the largest municipality of which is the City of St. Augustine which has a population of less than 13,000 people. It further recites that the County desires to preserve its unique character as a family oriented, historic attraction for tourists, and that nudity in public places is still subject to general societal disapproval by the people of the county. The core of Ordinance 92-12 is Section 6:

> Section 6. *Nudity Prohibited in Public Places.* It shall be unlawful for any person to knowingly, intentionally, or recklessly appear or cause another person to appear, nude in a public place or in any other place which is readily visible to the public. . . .

The definition of a "public place" includes business or commercial establishments such as restaurants, and the

parties agree that the ordinance clearly covers the Plaintiff's Cafe Erotica. Violation of the ordinance is a misdemeanor offense punishable by imprisonment in the county jail for not more than 60 days, a fine of not more than $500, or both.

One distinctive feature of the ordinance is its definition of the terms "breast," "buttocks," and "nudity." In net effect, a female is "nude" whenever more than two-thirds of the buttocks or more than three-fourths of the breasts are exposed; and detailed definitions of those body parts are provided to facilitate making the fractional measurements necessary in applying the ordinance to any given state of dress (or undress, as the case may be).

The Plaintiff instituted this action on April 22, 1992, the day after the ordinance was passed by St. Johns County. The complaint alleges that Ordinance 92-12 violates the Plaintiff's right to freedom of speech under the First and Fourteenth Amendments to the Constitution of the United States.

I

Following a hearing conducted at the outset of the litigation, I denied the Plaintiff's application for a preliminary injunction, finding, in light of the Supreme Court's landmark decision in *Barnes v. Glen Theater, Inc.*, 501 U.S. 560, 111 S.Ct. 2456, 115 L.Ed.2d 504 (1991), upholding a similar anti-nudity law, that the Plaintiff had failed to demonstrate a substantial likelihood of success on the merits. The Court of Appeals affirmed, *Cafe 207, Inc. v. St. Johns County*, 989 F.2d 1136 (11th Cir.1993), making it clear, however, that the court was not deciding the merits

of the constitutional issue, only that there was no abuse of discretion in my denial of preliminary injunctive relief.

In denying a preliminary injunction I analyzed the challenged ordinance under *Barnes*, as it teaches, by applying *United States v. O'Brien*, 391 U.S. 367, 88 S.Ct. 1673, 20 L.Ed.2d 672 (1968), and the four-part test established in that case for determining the constitutionality of restrictions on symbolic speech or expressive conduct. In *O'Brien* the Supreme Court said that when speech and non-speech elements are contained in the same course of conduct (O'Brien had burned his draft card as an act of political protest in the presence of a sizable crowd) a sufficiently important governmental interest in regulating the non-speech element can justify incidental limitations on First Amendment freedoms. Statutory regulation of such expressive conduct is constitutionally valid, therefore, if the enactment is: (1) within the constitutional power of the government; (2) furthers an important or substantial governmental interest; (3) such governmental interest is unrelated to the suppression of free expression; and (4) the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest.

Five of the Justices in *Barnes* had no difficulty in finding that a public indecency statute is within the constitutional power of the State.[1] Indeed, Justice Scalia concurred in the judgment on the basis that a law regulating

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[1] The plurality opinion was written by the Chief Justice, joined by Justices O'Connor and Kennedy. Justices Scalia and Souter each wrote separate opinions concurring in the judgment.

conduct, and not specifically directed at expression, is not subject to First Amendment scrutiny at all. The only difference between the plurality and Justice Souter related to identification of the substantial governmental interest served by the anti-nudity proscription.[2] The plurality found such interest to be the protection of order and morality, tracing the history and purpose of such laws to the ancient common law. Justice Souter, on the other hand, believed the governmental interest served by the statute to be "the State's substantial interest in combating the secondary effects of adult entertainment establishments of the sort typified by respondents' establishments." 501 U.S. at 580-583, 111 S.Ct. at 2468-2469.[3] See also, *International Eateries of America, Inc. v. Broward County,* 941 F.2d 1157 (11th Cir.1991).

[2] Unlike the detailed findings of fact contained within Ordinance 92-12 of St. Johns County, the Indiana statute at issue in *Barnes* contained no such findings and was not accompanied by any legislative history.

[3] Interestingly, and of pertinence to the Plaintiff's arguments in this case, Justice Souter made the following observations concerning his perceived justification for the statute (Id. at 2469):

> This asserted justification for the statute may not be ignored merely because it is unclear to what extent this purpose motivated the Indiana Legislature in enacting the statute. Our appropriate focus is not an empirical enquiry into the actual intent of the enacting legislature, but rather the existence or not of a current governmental interest in the service of which the challenged application of the statute may be constitutional.

It does not matter, therefore, as Plaintiff alleges, that Ordinance 92-12 was specifically aimed by its proponents at Plaintiff's business. It is, on its face, a law of general application to all

Thus far in the analysis, therefore, applying *Barnes* to the facts of this case, it is clear that the first three elements of the *O'Brien* four-part test are satisfied by Ordinance 92-12. The law, as an exercise of the County's police power, is clearly within its constitutional authority. It also serves a substantial and important governmental interest in protecting order and morality *and* in combating the secondary effects of nudity in adult entertainment establishments of the sort typified by the Plaintiff's Cafe Erotica. And, neither of those governmental interests is related to the suppression of free expression as such.

The Plaintiff vigorously argues that a trial is necessary to explore and decide fact issues relating to the individual motivations of the County Commissioners in enacting the ordinance, and whether there are, in actuality, any adverse secondary effects of adult entertainment establishments. It is claimed, with respect to the individual purposes of the commissioners, that the ordinance was really aimed at the Plaintiff, and the Plaintiff alone, so that it should be analyzed not as a law of general application primarily restricting conduct, not speech, but as a specific prior restraint on the Plaintiff's free speech activity requiring, at the least, a compelling public interest. Such an inquiry, however, is clearly (and

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nudity in public places and the fact – if it is a fact – that the Plaintiff's activities prompted its passage is of no constitutional significance. *Falls v. Town of Dyer, Indiana,* 875 F.2d 146 (7th Cir.1989), cited by Plaintiff in this context is clearly distinguishable. There the claim was selective *enforcement* of an ordinance of general application.

wisely)[4] foreclosed by the Supreme Court's decision in *O'Brien*.

> It is a familiar principle of constitutional law that this Court will not strike down an otherwise constitutional statute on the basis of an alleged illicit legislative motive. . . .
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> * * *
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> What motivates one legislator to make a speech about a statute is not necessarily what motivates scores of others to enact it, and the stakes are sufficiently high for us to eschew guesswork. 391 U.S. at 383-384, 88 S.Ct. at 1683 . . .

See also, *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 48, 106 S.Ct. 925, 929, 89 L.Ed.2d 29 (1986), and the opinion of Justice Souter in *Barnes* quoted in footnote 3, *supra*.

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[4] To permit legislators – or those, like county commissioners, exercising legislative authority – to be subject in litigation to examination about their individual motives in voting or not voting for particular measures would pose serious constitutional questions concerning separation of powers and would undermine the policy considerations supporting the doctrine of legislative privilege and immunity. *Palmer v. Thompson*, 403 U.S. 217, 225-226, 91 S.Ct. 1940, 1944, 29 L.Ed.2d 438 (1971), and *Village of Arlington Heights v. Metropolitan Housing Development Corporation*, 429 U.S. 252, 268, 97 S.Ct. 555, 565, 50 L.Ed.2d 450 (1977). Cases such as *Church of Scientology v. City of Clearwater*, 2 F.3d 1514 (11th Cir.1993) and *Jager v. Douglas County School District*, 862 F.2d 824 (11th Cir.1989), cert. denied, 490 U.S. 1090, 109 S.Ct. 2431, 104 L.Ed.2d 988 (1989), which do examine legislative motivation, were decided under the Establishment Clause of the First Amendment, and are clearly distinguishable for that reason.

Evidence about secondary effects or, rather, the lack of them, is also clearly foreclosed. It is now established as a matter of law by Supreme Court jurisprudence culminating in *Barnes*, that secondary effects of proscribed conduct may be taken into consideration by a court in evaluating the governmental interests justifying impingement upon free speech rights even when, as in *Barnes*, there is no legislative history demonstrating that the lawmakers actually considered secondary effects or any other specific factor (such as protecting order and morality) in enacting the challenged law. See also *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 106 S.Ct. 925, 89 L.Ed.2d 29 (1986) (lawmakers may rely as St. Johns County did here, upon studies conducted by other similar bodies in determining the secondary effects of adult theaters).

The lone remaining *O'Brien* test, then, is whether the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of the governmental interests served by the ordinance. On this point in *Barnes*, the plurality opinion said (501 U.S. at 570, 111 S.Ct. at 2463):

> It is without cavil that the public indecency statute is 'narrowly tailored;' Indiana's requirement that the dancers wear at least pasties and a G-string is modest, and the bare minimum necessary to achieve the state's purpose.

Justice Souter said essentially the same thing (Id., 501 U.S. at 586, 111 S.Ct. at 2471):

> The fourth O'Brien condition, that the restriction be no greater than essential to further

> the governmental interest, requires little discussion. Pasties and a G-string moderate the expression to some degree, to be sure, but only to a degree. Dropping the final stitch is prohibited, but the limitation is minor when measured against the dancer's remaining capacity and opportunity to express the erotic message.

In this case St. Johns County was not content with a law such as Indiana's in which pasties and a G-string are sufficient to separate a state of lawful dress from a state of unlawful nudity. Rather, the County's ordinance requires slightly, but only slightly, more body covering than the Indiana statute validated in *Barnes*. The Plaintiff argues, however, that precisely because the Court in *Barnes* approved a regulatory statute which was satisfied by the wearing of pasties and a G-string, the requirement of those articles of clothing is the *only* dress requirement that can constitutionally be imposed on expressive dancing. This, I believe, is a misreading of *Barnes*. All the court said in *Barnes*, in both the plurality opinion and in the opinion of Justice Souter, was that an anti-nudity law which is satisfied by the wearing of pasties and a G-string constituted a minimal intrusion on the expressive content of dancing and was the minimum requirement necessary to achieve the state's purpose. This is nothing more, after all, than a practical recognition that there *are* no articles of clothing having less dimension than pasties and a G-string, and this implicit observation does not constitute a holding that pasties and a G-string are also the *maximum* requirements of dress that an anti-nudity ordinance may impose. The Court simply did not reach and did not decide that issue. It was not presented by *Barnes*; and, in my view, is not presented by this case either. Besides, this

interpretation of what *Barnes* did *not* hold is fully consistent with other Supreme Court precedent in free speech cases. It is not necessary in the field of regulating expressive conduct that the "narrow tailoring" of such statutes requires elimination of all less restrictive alternatives. See, *Board of Trustees of the State University of New York v. Fox*, 492 U.S. 469, 477-480, 109 S.Ct. 3028, 3033-3034, 106 L.Ed.2d 388 (1989). Moreover, the Supreme Court has been "loath to second-guess the Government's judgment" with respect to the degree of regulation necessary to further the government's legitimate interests. *Id.*, 492 U.S. at 478, 109 S.Ct. at 3034.

Once it is established that a burden may be imposed on the expressive content of erotic dancing by requiring some clothing – pasties and a G-string – then it does not seem to me from a constitutional standpoint that a modest increase in the amount of body covering required by the law really adds any significant, incremental burden on the *expressive* component of the dance. As Justice Souter observed, " . . . the limitation is minor when measured against the dancer's remaining capacity and opportunity to express the erotic message." *Barnes*, 501 U.S. at 586, 111 S.Ct. at 2471. So, in this case, that erotic message may still be expressed with exposure of three-fourths of the breasts and two-thirds of the buttocks in the same manner it would be expressed while wearing pasties and a G-string. Or, even if there is some added incidental repression of speech, deference must be granted to the law making authority under *Board of Trustees v. Fox, supra*, in deciding the degree of regulation necessary to further the government's legitimate interests.

To be sure, so long as an anti-nudity statute is subject to any First Amendment scrutiny, i.e., an *O'Brien* evaluation, there must be a line in every case beyond which the law makers cannot go in requiring clothing or prohibiting exposure in some contexts. See *DeWeese v. Town of Palm Beach*, 812 F.2d 1365 (11th Cir.1987) (striking down as an irrational violation of the plaintiff's liberty interests under the Fourteenth Amendment an ordinance requiring male joggers to wear shirts.) Definition of that constitutional line, however, must await a case-by-case development of the law and further guidance from the Supreme Court. Suffice it to say that Ordinance 92-12 of St. Johns County does not cross that constitutional boundary.

II

In the order denying the Plaintiff's application for preliminary injunction based upon the foregoing analysis, I observed that "given the Court's determination in this order of the central constitutional issue presented, it may be that the case as a whole has been decided." The Plaintiff was therefore directed to file a memorandum enumerating the factual and legal issues, if any, remaining for decision. In response (Doc. 15 filed June 16, 1992) the Plaintiff specified three additional constitutional assertions requiring resolution:[5] (1) that the ordinance is

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[5] The Plaintiff also suggested that the case be abated pending the appeal from the denial of preliminary injunctive relief. That was done. Then, when the case returned from the Court of Appeals, the Court allowed some limited discovery before taking under submission the pending cross motions for summary judgment.

overbroad in violation of the First and Fourteenth Amendments; (2) that the ordinance is vague in violation of the due process clause of the Fourteenth Amendment; and (3) that the ordinance makes distinctions which violate the equal protection clause of the Fourteenth Amendment.

A. *Overbreadth.* The Plaintiff argues that even if the St. Johns County Public Nudity Ordinance applies to it, and is constitutional when so applied, it is nevertheless unconstitutional and unenforceable against anyone because it is "so drawn as to sweep within its ambit protected speech or expression of other persons not before the Court." *Doran v. Salem Inn, Inc.*, 422 U.S. 922, 933, 95 S.Ct. 2561, 2568-69, 45 L.Ed.2d 648 (1975). Specifically, the Plaintiff argues that well known theatrical productions such as Hair, Equus, and Ballet Africains, each of which contain scenes of frontal nudity of the body as a whole, would be prohibited by the Ordinance; that such productions are clearly protected speech under the First Amendment; and that the Ordinance is therefore unconstitutionally overbroad and invalid.

Two intertwined issues are presented by this argument. The first is whether the Plaintiff has standing to make it, and the second involves the standard to be applied in deciding the overbreadth claim on its merits if the Plaintiff does have standing. The resolution of both of these issues is governed by *Broadrick v. Oklahoma*, 413 U.S. 601, 93 S.Ct. 2908, 37 L.Ed.2d 830 (1973), and *Geaneas v. Willets*, 911 F.2d 579 (11th Cir.1990), cert. denied, 499 U.S. 955, 111 S.Ct. 1431, 113 L.Ed.2d 484 (1991).

In *Broadrick* the Supreme Court considered a First Amendment attack on an Oklahoma statute patterned after the Hatch Act restricting political activities of certain state employees. There, as here, the plaintiffs claimed that even though their political fund raising conduct fell squarely within the constitutionally valid proscriptions of the statute, it should nevertheless be condemned as unconstitutional because it was overbroad to the point of regulating pure speech such as the wearing of political buttons or the displaying of bumper stickers. The Court began its analysis by noting that ordinarily "a person to whom a statute may constitutionally be applied will not be heard to challenge that statute on the ground that it may conceivably be applied unconstitutionally to others, in other situations not before the Court." 413 U.S. at 610, 93 S.Ct. at 2915. The Court then acknowledged that First Amendment cases had come to be recognized as an exception to the general rule and that litigants are permitted to raise overbreadth claims when the "statute's very existence may cause others not before the Court to refrain from constitutionally protected speech or expression." Id. at 612, 93 S.Ct. at 2916. The Court noted, however, that when First Amendment overbreadth claims have been invoked against ordinary criminal laws that are sought to be applied to protected conduct, the usual remedy is to reverse any criminal conviction flowing from the law as unconstitutionally applied, not to adjudicate that the law itself is facially invalid. The Court then concluded (Id. at 615-616, 93 S.Ct. at 2917-2918):

> It remains a "matter of no little difficulty" to determine when a law may properly be held void on its face and when "such summary

action" is inappropriate. *Coates v. City of Cincinnati*, 402 U.S. 611, 617, 91 S.Ct. 1686, 1689, 29 L.Ed.2d 214 (1971) (opinion of Black, J.). But the plain import of our cases is, at the very least, that facial overbreadth adjudication is an exception to our traditional rules of practice and that its function, a limited one at the outset, attenuates as the otherwise unprotected behavior that it forbids the State to sanction moves from "pure speech" toward conduct and that conduct – even if expressive – falls within the scope of otherwise valid criminal laws that reflect legitimate state interests in maintaining comprehensive controls over harmful, constitutionally unprotected conduct. Although such laws, if too broadly worded, may deter protected speech to some unknown extent, there comes a point where that effect – at best a prediction – cannot, with confidence, justify invalidating a statute on its face and so prohibiting a State from enforcing the statute against conduct that is admittedly within its power to proscribe. Cf. *Alderman v. United States*, 394 U.S. 165, 174-175, 89 S.Ct. 961, 966-967, 22 L.Ed.2d 176 (1969). To put the matter another way, particularly where conduct and not merely speech is involved, we believe that the overbreadth of a statute must not only be real, but substantial as well, judged in relation to the statute's plainly legitimate sweep. It is our view that § 818 is not substantially overbroad and that whatever overbreadth may exist should be cured through case-by-case analysis of the fact situations to which its sanctions, assertedly, may not be applied.

In *Geaneas v. Willets*, 911 F.2d 579 (11th Cir.1990), the Court of Appeals had occasion to apply *Broadrick* in a

case involving an anti-nudity ordinance predicated on the Twenty First Amendment and the authority of the states to regulate establishments licensed to sell alcohol as decided in *New York State Liquor Authority v. Bellanca*, 452 U.S. 714, 101 S.Ct. 2599, 69 L.Ed.2d 357 (1981). The contention was made in *Geaneas* that the ordinance in question was overbroad because it applied to establishments "dealing" in alcoholic beverages, not merely those licensed to sell alcohol, and that it might therefore be applied against establishments beyond the reach of the Twenty First Amendment. The Court, citing *Broadrick*, refused to consider the overbreadth claim (911 F.2d at 584-585):

> The overbreadth doctrine clearly does not apply here. As we discuss above, there can be no doubt that the Daytona Beach ordinance constitutes a valid exercise of the City's twenty-first amendment power to ban nude dancing in bars. Such a proscription lies at the core of the City's powers under the twenty-first amendment. The plaintiffs' conduct in the present case, moreover, rests extremely close to this core. Whether or not the ordinance reaches to conduct at a distance from these core concerns, the plaintiffs clearly have no standing under *Broadrick* to challenge, on this basis, the ordinance's application to them. The plaintiffs' overbreadth argument lacks foundation.

The principles distilled from these controlling decisions are that the overbreadth doctrine as an exception to the requirement of standing in First Amendment cases is to be sparingly applied; that this is especially true in cases like this one involving a criminal statute and a

plaintiff whose asserted First Amendment interest constitutes expressive conduct as distinguished from protected pure speech; and for the overbreadth claim to be entertained in such a case the excessive scope of the statute or ordinance being reviewed must not only be real but substantial, and not subject to cure through case-by-case analysis and limiting judicial construction or partial invalidation.

Applying those principles to this case it becomes clear that the Plaintiff lacks standing. Even if, as Plaintiff suggests, the sweep of Section 6 of the Ordinance (quoted *supra*) is broad enough to encompass protected expression in the form of incidental nudity in theatrical performances having serious artistic value (so as to be non-obscene), it is here that Section 7 of the Ordinance would step in to safeguard the protected speech.

> Section 7. EXEMPTIONS: The prohibitions of section 6 of this ordinance shall not apply:
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> * * *
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> b) When the conduct of being Nude cannot legally be prohibited by this ordinance (i) because it constitutes a part of a bona fide live communication, demonstration or performance by a Person wherein such nudity is expressive conduct incidental to and necessary for the conveyance or communication of a genuine message or public expression and is not a mere guise or pretense utilized to exploit the conduct of being Nude for profit or commercial gain (see for instance Board of County Commissioners vs. Dexterhouse, 348 So.2d 916 (Fla. 2nd DCA 1977) and as such is protected by

> the United States or Florida Constitution or (ii) because it is otherwise protected by the United States or Florida Constitution.

Furthermore, any court called upon to interpret and apply Section 7 exemptions would also have the guidance of the pertinent legislative findings embodied in the whereas clauses of the Ordinance:[6]

> m) WHEREAS, the Board's sole intent in enacting this ordinance is to prohibit the conduct of being Nude in Public Places and to suppress the adverse secondary effects such nudity generates, the Board nevertheless recognizes that there may be instances wherein appearing Nude in a Public Place may be expressive conduct incidental to and a necessary part of the freedom of expression that is protected by United States or Florida constitutional provisions; and,
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> * * *
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> x) WHEREAS, the Board is not hereby prohibiting nudity in truly private places or prohibiting nudity which is protected by United States or Florida constitutional provisions; and,
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> y) WHEREAS, the Board finds and determines that the express exemption contained in Section 7(b)(ii) of this ordinance provides adequate protection to Persons who, without such

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[6] Additionally, Section 2(b) entitled "Intent," restates *verbatim* the language of Section 7(b) quoted in the text, presumably for the purpose of reinforcing the idea that the ordinance was not intended to preclude non-obscene theatrical productions.

express exemption, might otherwise be prevented or discouraged by the ordinance from exercising constitutionally protected rights.

I conclude that, in light of the Section 7 exemptions and judging the ordinance as a whole under the principles of *Broadrick* and *Geaneas*, there is no real and substantial overbreadth in the measure that cannot await case-by-case limiting construction or, if necessary, partial invalidation.[7] It follows, in other words, that the Plaintiff lacks standing to raise its overbreadth claims in this case.

B. *Vagueness.* The Plaintiff argues that the exceptions carved out by Section 7 of the Ordinance are unconstitutionally vague thereby rendering the law as a whole in violation of the due process clause of the Fourteenth Amendment. Such vagueness, it is said, arises from the need to interpret the words in Section 7 which exempt

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[7] The ordinance also contains a severance clause:

> Section 11. **SEVERABILITY**: If any section, subsection, sentence, clause, phrase, word or provision of this ordinance is for any reason held invalid or unconstitutional by any court of competent jurisdiction, whether for substantive, procedural, or any other reason, such portion shall be deemed a separate, distinct and independent provision, and such holding shall not affect the validity of the remaining portions of this ordinance.

The presence of the exemption provision, Section 7, and the whereas clauses quoted in the text together with this severance clause preserving the main thrust of the ordinance in the event of partial invalidity, all serve to distinguish *Triplett Grille, Inc. v. City of Akron*, 816 F.Supp. 1249 (N.D.Ohio 1993) the only post *Barnes* decision upon which the Plaintiff principally relies in making its overbreadth argument.

any "bona fide live communication, demonstration or performance . . . protected by the United States or Florida Constitution." (See Doc. 32, Plaintiff's Memorandum of Law, pages 8-13).

At the threshold of this argument is the question, as in the case of the Plaintiff's overbreadth contention, of whether the Plaintiff has standing to assert the claim since there is no suggestion that the alleged vagueness touches in any way the application of the ordinance to the Plaintiff's nude dancing activity. The answer, in my view, is the same. The exception was clearly intended to stake out those theatrical performances involving nudity with artistic value so as to be non-obscene and within the protection of the First Amendment. Merely because it is impractical if not impossible to precisely describe in words all of the types of nude performances falling within the protection of the First Amendment does not make the exception unconstitutionally vague. Case-by-case adjudication is required and will satisfy the due process requirements of the Fourteenth Amendment. The issue is not unlike – and, indeed, is closely related to – the question as to whether the obscenity laws are themselves unconstitutional for vagueness. How does one know when something is obscene?[8] In *Miller v. California*, 413 U.S. 15, 93 S.Ct. 2607, 37 L.Ed.2d 419 (1973), the Court referred to "the somewhat tortured history of the Court's

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[8] In *Jacobellis v. Ohio*, 378 U.S. 184, 197, 84 S.Ct. 1676, 1683, 12 L.Ed.2d 793 (1964), Justice Stewart declared in his concurring opinion that the Court's ongoing effort, at that time, to define obscenity constituted a "task of trying to define what may be indefinable . . . But I know it when I see it . . . "

obscenity decisions," 413 U.S. at 20, 93 S.Ct. at 2612, and then declared, after laying down the now familiar three part *Miller* test for identification of obscene matter (Id. at 25, 93 S.Ct. at 2615):

> If a state law that regulates obscene material is thus limited, as written or construed, the First Amendment values applicable to the States through the Fourteenth Amendment are adequately protected by the ultimate power of appellate courts to conduct an independent review of constitutional claims when necessary. (Emphasis supplied).

Clearly, then, an articulated exception in an anti-nudity ordinance which is plainly intended to carve out non-obscene and therefore protected displays of nudity in artistically valuable theatrical performances cannot be condemned for facial vagueness, otherwise the obscenity laws, which must undertake the same chore (i.e., carving out non-obscene matter per *Miller* either as written or as construed) would necessarily suffer the same condemnation.[9]

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[9] Interestingly, in footnote 8 to the *Miller* opinion (413 U.S. at 26, 93 S.Ct. at 2616), the Court specifically noted that it was not dealing in that case with live conduct, stating that "the States have greater power to regulate nonverbal, physical conduct than to suppress depictions or descriptions of the same behavior."

Also, in footnote 9 (id. at 26, 93 S.Ct. at 2616), with respect to the elusive nature or vagueness of the concept of obscenity, the Court said: "The mere fact juries may reach different conclusions as to the same material does not mean that constitutional rights are abridged . . . [I]t is common experience that different juries may reach different results under any

I conclude that the Ordinance is not unconstitutionally vague in violation of the due process clause of the Fourteenth Amendment.

C. *Denial of Equal Protection.* The Plaintiff essentially makes two arguments in its effort to demonstrate that the Ordinance denies it equal protection of the law. First, it contends that the Ordinance distinguishes between commercial and non-commercial forms of public nudity, and since the strict scrutiny standard should be applied rather than the rational basis test because First Amendment rights are involved, the distinction cannot be justified. The argument fails, however, simply because it proceeds from a mistaken premise. The Ordinance does not distinguish between commercial and non-commercial nudity in public places. Both are prohibited. The difference that is alluded to in the law occurs in the factual findings which, as described by the Defendant, "merely determine that commercial public nudity escalates the adverse secondary effects associated with free public nudity." (Doc. 27, Defendant's Memorandum, page 4). The other distinction drawn between "free" nudity and nudity for profit or commercial exploitation is found in Sections 3(h) and 7(a). These sections, respectively, define and exempt places customarily provided or set apart for nudity such as locker rooms or public rest rooms unless the nudity in such a place is being "used for the promotion of business or is otherwise commercially exploited." The commercial, non-commercial distinction, in other words, is made in the form of a narrow exception to an exception and does

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criminal statute. That is one of the consequences we accept under our jury system."

not alter in any way the principal objective of the Ordinance, namely, the regulation of public nudity whether commercially motivated or not. There is no unconstitutional violation of the Plaintiff's right to equal protection in this aspect of the Ordinance.

The Plaintiff's second equal protection claim is grounded in *Salem Inn, Inc. v. Frank*, 522 F.2d 1045 (2d Cir.1975), in which the court held that an ordinance distinguishing between topless dancing in a bar and topless dancing in the "legitimate" theater violated equal protection. The opinion proceeded upon the assumption, however, that nudity in both places enjoyed the same level of First Amendment protection and is now undermined by the Supreme Court's decision in *Barnes*. Moreover, it is difficult to see how an effort to draft distinctions between protected and unprotected forms of speech or expressive conduct required by the First Amendment could, without more, be violative of the equal protection clause of the Fourteenth Amendment.

I conclude that there are no genuine issues of material fact, that the St. Johns County Public Nudity Ordinance successfully withstands the constitutional challenges of the Plaintiff, and that the Defendant is entitled to summary judgment as a matter of law. The Plaintiff's motion for that relief is Denied; the Defendant's is Granted. The Clerk is instructed to enter judgment accordingly.

IT IS SO ORDERED.

DONE and ORDERED.

APPENDIX C

ORDINANCE 92-12

AN ORDINANCE OF THE BOARD OF COUNTY COMMISSIONERS OF THE COUNTY OF ST. JOHNS, STATE OF FLORIDA, TO BE KNOWN AS THE ST. JOHNS COUNTY PUBLIC NUDITY ORDINANCE; STATING THE INTENT OF THE ORDINANCE; PROVIDING THE DEFINITION OF NUDITY AS PROHIBITED BY THIS ORDINANCE AND PROVIDING OTHER DEFINITIONS; PROVIDING LEGISLATIVE FINDINGS; PROHIBITING NUDITY AND SEXUAL CONDUCT OR THE SIMULATION THEREOF WITHIN ALCOHOLIC BEVERAGE ESTABLISHMENTS; PROHIBITING NUDITY IN CERTAIN OTHER PUBLIC PLACES; PROVIDING FOR ENFORCEMENT AND PENALTIES FOR THE VIOLATION OF THIS ORDINANCE; PROVIDING FOR INJUNCTIVE RELIEF; PROVIDING FOR SEVERABILITY; PROVIDING FOR INCLUSION IN THE COUNTY CODE; AND PROVIDING AN EFFECTIVE DATE.

a) WHEREAS, the Board of County Commissioners of St. Johns County, Florida (the "Board"), is aware that local governments may, by virtue of the twenty-first (21st) amendment to the United States Constitution, regulate and prohibit various forms of actual and simulated Nude and sexual conduct, and the depiction thereof, within and around Establishments Dealing In Alcoholic Beverages. See *California v. LaRue*, 409 U.S. 109, 93 S.Ct. 390, *rehearing denied*, 410 U.S. 948, 93 S.Ct. 1351 (1972); and *New York State Liquor Authority v. Bellanca*, 452 U.S. 714, 101 S.Ct. 2599 (1981); and,

b) WHEREAS, the Board is aware that local governments may prohibit the exposure of certain body parts in and around Establishments Dealing In Alcoholic Beverages, see *Geaneas v. Willets*, 911 F.2d 579 (11th Cir. 1990); and,

c) WHEREAS, the Board wishes to regulate nudity and sexual conduct in and around Establishments Dealing in Alcoholic Beverages; and, the Board is aware of evidence from other communities that indicates that nudity and sexual conduct, coupled with alcohol in Public Places, begets undesirable behavior, and that prostitution, attempted rape, rape, and assault have occurred and have the potential for occurring in and around Establishments Dealing In Alcoholic Beverages where Nude and sexual conduct is permitted; and,

d) WHEREAS, the Board wishes to protect against similar conditions to the end that they not occur in St. Johns County at or around Establishments Dealing In Alcoholic Beverages; and,

e) WHEREAS, the Board desires to prohibit the public display of Nude conduct and sexual behavior or the simulation thereof in and around Establishments Dealing In Alcoholic Beverages; and,

f) WHEREAS, the Board finds and determines that there are increasing incidents of nudity in Public Places other than Establishments Dealing In Alcoholic Beverages and in other places readily visible to the public; and,

g) WHEREAS, the Board finds and determines that Persons who choose to appear Nude in Public Places are engaging in conduct which often serves to impose their

nudity on others who did not seek it out, who are not able to reasonably avoid observing it, and who may be offended or distressed thereby; and,

h) WHEREAS, appearing Nude in Public Places was a criminal offense at common law and was considered an act malum en se; and,

i) WHEREAS, the Board desires to protect and preserve the unique character of St. Johns County as a family oriented, historic attraction for families, tourists and businesses; and,

j) WHEREAS, the Board finds and determines that appearing Nude in Public Places is still contrary to the general societal disapproval that the people of St. Johns County have of persons appearing Nude among strangers in Public Places; and,

k) WHEREAS, the Board finds and determines that the mere appearance of Persons in the Nude in Public Places generally increases incidents of prostitution, sexual assaults and batteries, attracts other criminal activity to the community, and encourages degradation of women and other activities which break down family structures; and,

l) WHEREAS, the Board finds and determines that without regulation, public nudity constitutes harmful conduct and occurs in a manner which is incompatible with the normal primary activity of a particular place at a particular time; and,

m) WHEREAS, the Board's sole intent in enacting this ordinance is to prohibit the conduct of being Nude in Public Places and to suppress the adverse secondary

effects such nudity generates, the Board nevertheless recognizes that there may be instances wherein appearing Nude in a Public Place may be expressive conduct incidental to and a necessary part of the freedom of expression that is protected by United States or Florida constitutional provisions; and,

n) WHEREAS, a requirement that dancers don opaque covering sufficient to cover the Buttocks and the Breasts as such portions of the human anatomy are defined in this ordinance does not deprive the dance of whatever erotic message, if any, it may convey, but simply makes such message, if any, slightly less graphic and imposes only an incidental limitation on the message; and,

o) WHEREAS, it is the intent of the Board to protect and preserve the public health, safety, welfare and morals of St. Johns County by restricting, to the full extent allowed by the United States and Florida constitutions, the act of being Nude to places which are not frequented by the public and places which are not readily visible to the public; and,

p) WHEREAS, St. Johns County is essentially a rural – suburban community the largest municipality of which (the City of St. Augustine) has a population of less than 13,000 people; and,

q) WHEREAS, St. Johns County is a county that is, and desires very much to continue to be, a community that contains and is known for traditional wholesome public recreation activities and historic facilities such as: the historic city of St. Augustine; the ocean beaches; the

inland waterways; the golf Tournament Players Championship; the international headquarters and facilities of the Association of Tennis Professionals; and the future home of the PGA Tour Hall of Fame; and,

r) WHEREAS, the Board finds and determines that the average person applying contemporary St. Johns County community standards would find that the public nudity prohibited by this ordinance, if allowed, when taken as a whole (i) appeals to the prurient interests and (ii) lacks serious literary, artistic, political, and scientific value; and,

s) WHEREAS, non regulation of persons appearing nude in Public Places within St. Johns County encourages commercial Entities and other Entities and Persons to advertise outside of St. Johns County and the State of Florida by billboard, radio, print and other media the availability of nudity in Public Places within St. Johns County and thus encourages the influx into St. Johns County of Persons seeking (i) to observe and/or participate in such nudity and (ii) to participate in the disorderly, harmful, and illegal conduct that is associated therewith, thereby increasing injuries and damages to the citizens of this county who will be victims of such increased disorderly, harmful, and unlawful conduct; and,

t) WHEREAS competitive commercial advertising and/or exploitation of nudity encourages escalation of Nude and lewd conduct within the competing commercial establishments exploiting such conduct and thereby increases the adverse effects upon public order and the public health; and

u) WHEREAS, the Board finds and determines that the prohibitions contained herein are the most reasonable and minimal restrictions required so as to regulate conduct which is adverse to public order, health, morality, and decency within St. Johns County when such conduct takes place at locations where the public is present or is likely to be present, or where such conduct would be readily visible to the public; and,

v) WHEREAS, the passage of this ordinance is necessary to preserve the basic character of the unincorporated community of St. Johns County; and

w) WHEREAS, the Board is aware that States may regulate the conduct of appearing Nude in Public Places, see *Michael Barnes v. Glen Theatre, Inc.*, 115 L.Ed.2d 504, 111 S.Ct. 2456 (1991); and,

x) WHEREAS, the Board is not hereby prohibiting nudity in truly private places or prohibiting nudity which is protected by United States or Florida constitutional provisions; and,

y) WHEREAS, the Board finds and determines that the express exemption contained in Section 7(b)(ii) of this ordinance provides adequate protection to Persons who, without such express exemption, might otherwise be prevented or discouraged by the ordinance from exercising constitutionally protected rights; and

z) WHEREAS, although the Board is of the opinion that this ordinance is a general ordinance regulating conduct and is not an ordinance that affects the use of land as contemplated by Florida Statute 125.66, the Board does not wish to become sidetracked in lengthy and expensive

litigation concerning procedural matters that are not relevant to the subject matter of this ordinance and has determined to enact this ordinance under the more conservative, expensive, and time consuming "affecting use of land" procedure as well as under the general procedure for ordinances that regulate conduct; and,

aa) WHEREAS, the Board finds and determines that this ordinance is consistent with its current comprehensive plan;

NOW, THEREFORE, BE IT ORDAINED BY THE BOARD OF COUNTY COMMISSIONERS OF ST. JOHNS COUNTY, FLORIDA, THAT:

Section 1. TITLE: This ordinance shall be known as the St. Johns County Public Nudity Ordinance.

Section 2. INTENT: It is the intent of this ordinance to protect and preserve the health, safety, welfare, and morals of the citizens of St. Johns County by prohibiting a Person from intentionally or recklessly appearing or being Nude, or causing another Person to appear or be Nude, in a Public Place and in other places which may reasonably be expected to be observed by the public within the unincorporated areas of St. Johns County except:

a) When such Person appears Nude in a Place Provided Or Set Apart For Nudity provided (i) such Person is Nude for the sole purpose of performing the legal function(s) that is customarily intended to be performed within such Place Provided Or Set Apart For Nudity and (ii) such Person is not Nude for the purpose of obtaining money or other

financial gain for such Person or for another person or Entity, or;

b) When the conduct of being Nude can not legally be prohibited by this ordinance (i) because it constitutes a part of a bona fide live communication, demonstration or performance by such Person wherein such nudity is expressive conduct incidental to and necessary for the conveyance or communication of a genuine message or public expression and is not a guise or pretense utilized to exploit nudity for profit or commercial gain (see for instance *Board of County Commissioners vs. Dexterhouse,* 348 So. 2d 916 (Fla. 2nd DCA 1977) and as such is protected by the United States or Florida Constitution or (ii) because it is otherwise protected by the United States or Florida Constitution.

It is the Board's further intention to accomplish those intents and purposes expressed by the Board in the "Whereas" provisions of this ordinance, each of which are incorporated by reference into this Section 2.

Section 3. DEFINITIONS: Capitalized terms, when used in this ordinance, shall have the following meanings:

a. Alcoholic Beverages: All distilled spirits and all beverages containing one-half of 1 percent or more alcohol by volume. The percentage of alcohol by volume shall be determined by measuring the volume of the standard ethyl alcohol in the beverage and comparing it with the volume of the remainder of the ingredients as though said remainder ingredients were distilled water.

b. Breast: A portion of the human female mammary gland (commonly referred to as the female breast) including the nipple and the areola (the darker colored area of the breast surrounding the nipple) and an outside area of such gland wherein such outside area is (i) reasonably compact and contiguous to the areola and (ii) contains at least the nipple and the areola and 1/4 of the outside surface area of such gland.

c. Buttocks: (For a short *general* description see the last sentence of this subsection.) The area at the rear of the human body (sometimes referred to as the glutaeus maximus) which lies between two imaginary straight lines running parallel to the ground when a person is standing, the first or top such line being 1/2 inch below the top of the vertical cleavage of the nates (i.e., the prominence formed by the muscles running from the back of the hip to the back of the leg) and the second or bottom such line being 1/2 inch above the lowest point of the curvature of the fleshy protuberance (sometimes referred to as the gluteal fold), and between two imaginary straight lines, one on each side of the body (the "outside lines"), which outside lines are perpendicular to the ground and to the horizontal lines described above and which perpendicular outside lines pass through the outermost point(s) at which each nate meets the outer side of each leg. Notwithstanding the above, Buttocks shall not include the leg, the hamstring muscle below the gluteal fold, the tensor fasciae latae muscle or any of the above-described portion of the human body that is between either (i) the left inside perpendicular line and the left outside perpendicular line or (ii) the right inside perpendicular line and the right outside perpendicular

line. For the purpose of the previous sentence the left inside perpendicular line shall be an imaginary straight line on the left side of the anus (i) that is perpendicular to the ground and to the horizontal lines described above and (ii) that is 1/3 of the distance from the anus to the left outside line, and the right inside perpendicular line shall be an imaginary straight line on the right side of the anus (i) that is perpendicular to the ground and to the horizontal lines described above and (ii) that is 1/3 of the distance from the anus to the right outside line. (The above description can *generally* be described as covering 1/3 of the buttocks centered over the cleavage for the length of the cleavage.)

d. Entity: Any proprietorship, partnership, corporation, association, business trust, joint venture, joint-stock company or other for profit and/or not for profit organization.

e. Establishment Dealing In Alcoholic Beverages: Any business, commercial or other establishment (whether for profit or not for profit and whether open to the public at large or where entrance is limited by cover charge or membership requirement) including those licensed by the State for sale and/or service of Acoholic [sic] Beverages, and any bottle club; hotel; motel; restaurant; night club, country club; cabaret; meeting facility utilized by any religious, social, fraternal or similar organization; business, commercial or other establishment where a product or article is sold, dispensed, served or provided with the knowledge, actual or implied, that the same will be, or is intended to be mixed, combined with or drunk in connection or combination with an Alcoholic Beverage on the premises or curtilage of said business,

commercial or other establishment; or business, commercial or other establishment where the consumption of Alcoholic Beverages is permitted. Premises, or portions thereof such as hotel rooms, used solely as a private residence, whether permanent or temporary in nature, shall not be deemed to be an Establishment Dealing In Alcoholic Beverages.

f. Nude: Any Person insufficiently clothed in any manner so that any of the following body parts are not entirely covered with a fully opaque covering:

(1) The male or female genitals, or

(2) The male or female pubic area, or

(3) The female Breast (see the last sentence in this subsection f), or

(4) The Buttocks. Attire which is insufficient to comply with this requirement includes, but is not limited to, G-Strings, T-Backs, dental floss and thongs.

Body paint, body dyes, tattoos, liquid latex whether wet or dried, and similar substances shall not be considered opaque covering. Each female Person may determine which 1/4 of her Breast surface area (see definition of Breast) contiguous to and containing the nipple and the areola is to be covered.

g. Person: Any live human being aged ten years of age or older.

h. Places Provided Or Set Apart For Nudity: Shall mean enclosed single sex public restrooms, enclosed single sex functional shower, locker and/or dressing room facilities, enclosed motel rooms and hotel rooms

designed and intended for sleeping accomodations [sic], doctor's offices, portions of hospitals, and similar places in which nudity or exposure is necessarily and customarily expected outside of the home and the sphere of privacy constitutionally protected therein. This term shall not be deemed to include places where a person's conduct of being Nude is used for his or her profit or where being Nude is used for the promotion of business or is otherwise commercially exploited.

i. Public Place: Any location frequented by the public, or where the public is present or likely to be present, or where a person may reasonably be expected to be observed by members of the public. Public Places include, but are not limited to, streets, sidewalks, parks, beaches, business and commercial establishments (whether for profit or not for profit and whether open to the public at large or where entrance is limited by a cover charge or membership requirement), bottle clubs, hotels, motels, restaurants, night clubs, country clubs, cabarets, and meeting facilities utilized by any religious, social, fraternal or similar organization. Premises, or portions thereof such as hotel rooms, used solely as a private residence, whether permanent or temporary in nature shall not be deemed to be a Public Place.

Section 4. LEGISLATIVE FINDINGS: In addition and supplemental to the findings and deterinations [sic] contained in the "Whereas" provisions of this ordinance which are incorporated by reference into this Section 4, it is hereby found by the Board, acting in its legislative capacity for the purpose of regulating the conduct of appearing Nude in Public Places and for the purpose of regulating nudity and other conduct in Establishments

Dealing In Alcoholic Beverages, that, considering what has happened in other communities, the acts prohibited in Section 5 hereinbelow encourage or create the potential for the conduct of prostitution, attempted rape, rape, and assault in and around Establishments Dealing In Alcoholic Beverages; that actual and simulated nudity and sexual conduct, coupled with the consumption of Alcoholic Beverages in Public Places, begets and has the potential for begetting undesirable and unlawful behavior; that sexual, lewd, lascivious, and salacious conduct among patrons and employees within Establishments Dealing In Alcoholic Beverages results in violation of law and creates dangers to the health, safety, morals, and welfare of the public and those who engage in such conduct; and, it is the intent of section 5 of this ordinance to specifically prohibit nudity, gross sexuality and the simulation thereof in Establishments Dealing In Alcoholic Beverages.

Section 5. NUDITY, SEXUAL CONDUCT PROHIBITED IN ESTABLISHMENTS DEALING IN ALCOHOLIC BEVERAGES: The following prohibitions and criteria shall apply within existing and/or newly created Establishments Dealing In Alcoholic Beverages and the curtilages thereof:

a. No person shall knowingly, intentionally or recklessly appear, or cause another person to appear, Nude or expose to public view his or her genitals, pubic area, vulva, or Buttocks, or any simulation thereof;

b. No female person shall knowingly, intentionally or recklessly expose, or cause another female

person to expose her Breasts or any simulation thereof to public view;

c. No person or Entity maintaining, owning, or operating an Establishment Dealing In Alcoholic Beverages shall encourage, allow or permit any person to appear Nude or to expose to public view his or her genitals, pubic area, vulva, anus, or any portion of the Buttocks or simulation thereof. This section shall be violated if any portion of the Buttocks is visible from any vantage point.

d. No person or Entity maintaining, owning, or operating an Establishment Dealing In Alcoholic Beverages shall encourage, allow or permit any female person to expose her Breasts or any simulation thereof to public view;

e. No person shall engage in and no person or Entity maintaining, owning, or operating an Establishment Dealing In Alcoholic Beverages shall encourage, allow or permit any sexual intercourse, masturbation, sodomy, bestiality, oral copulation, flagellation, lap dancing, straddle dancing, any sexual act which is prohibited by law, touching, caressing, or fondling of the breasts, buttocks, anus, or genitals, or the simulation thereof.

f. The prohibitions of this Section 5 shall not apply when a person appears Nude in a Place Provided Or Set Apart For Nudity provided (i) such person is Nude for the sole purpose of performing the legal function(s) that is customarily intended to be performed within such Place Provided Or Set Apart For Nudity and (ii) such person is not Nude for the purpose of obtaining

money or other financial gain for such person or for another person or Entity.

g) Each female person may determine which 1/4 of her Breast surface area (see definition of Breast) contiguous to and containing the areola is to be covered.

h) This section 5 shall not be deemed to address photographs, movies, video presentations, or other non live performances.

Section 6. NUDITY PROHIBITED IN PUBLIC PLACES: It shall be unlawful for any Person to knowingly, intentionally, or recklessly appear, or cause another Person to appear, Nude in a Public Place or in any other place which is readily visible to the public, except as provided in Section 7. It shall also be unlawful for any Person or Entity maintaining, owning, or operating any Public Place establishment to encourage, suffer or allow any Person to appear Nude in such Public Place, except as provided in Section 7.

Section 7. EXEMPTIONS: The prohibitions of section 6 of this ordinance shall not apply:

a. When a Person appears Nude in a Place Provided Or Set Apart For Nudity provided (i) such Person is Nude for the sole purpose of performing the legal function(s) that is customarily intended to be performed within such Place Provided Or Set Apart For Nudity and (ii) such Person is not Nude for the purpose of obtaining money or other financial gain for such Person or for another person or Entity, or;

b) When the conduct of being Nude can not legally be prohibited by this ordinance (i)

because it constitutes a part of a bona fide live communication, demonstration or performance by a Person wherein such nudity is expressive conduct incidental to and necessary for the conveyance or communication of a genuine message or public expression and is not a mere guise or pretense utilized to exploit the conduct of being Nude for profit or commercial gain (see for instance *Board of County Commissioners vs. Dexterhouse,* 348 So. 2d 916 (Fla. 2nd DCA 1977) and as such is protected by the United States or Florida Constitution or (ii) because it is otherwise protected by the United States or Florida Constitution.

Section 8. ENFORCEMENT AND PENALTIES: Any person or Entity violating any of the provisions of this ordinance shall be prosecuted in the same manner as misdemeanors are prosecuted. Such violations shall be prosecuted in the name of the State of Florida in a court having jurisdiction of misdemeanors by the prosecuting attorney thereof and, upon conviction shall be punished by a fine not to exceed $500 or by imprisonment in the County jail not to exceed 60 days or by both such fine and imprisonment. Each incident or separate occurrence of an act that violates this ordinance shall be deemed a separate offense.

Section 9. INJUNCTIVE RELIEF: In addition to the procedures provided herein, Establishments Dealing In Alcoholic Beverages that are not in conformity with these requirements shall be subject to appropriate civil action in the court of appropriate jurisdiction for abatement.

Section 10. TERRITORY EMBRACED: All territory within the legal boundaries of unincorporated St. Johns County shall be embraced by the provisions of this ordinance.

Section 11. SEVERABILITY: If any section, subsection, sentence, clause, phrase, word or provision of this ordinance is for any reason held invalid or unconstitutional by any court of competent jurisdiction, whether for substantive, procedural, or any other reason, such portion shall be deemed a separate, distinct and independent provision, and such holding shall not affect the validity of the remaining portions of this ordinance.

Section 12. INCLUSION IN THE CODE: It is the intention of the Board and it is hereby provided that the provisions of this ordinance shall be made a part of the St. Johns County Code; that the sections of this ordinance may be renumbered or relettered to accomplish such intention; and that the word "ordinance" may be changed to "section", "article", or other appropriate designation.

Section 13. In order to reduce controversy and provide widespread notice to the public, this ordinance shall be combined and compiled in and with the County's land development code in addition to and with the county code of St. Johns County.

Section 14. EFFECTIVE DATE: This ordinance shall become effective immediately upon receipt by the Clerk of the Board of notice that it has been filed with the Department of State.

PASSED AND ADOPTED by the Board of County Commissioners of St. Johns County, State of Florida this 21st day of April, 1992.

Effective Date: _____

BOARD OF COUNTY
COMMISSIONERS OF ST. JOHNS
COUNTY, FLORIDA

By: /s/ Illegible
Its Chairman

ATTEST: CARL "BUD" MARKEL, ITS CLERK

By: /s/ Carl "Bud" Markel
Clerk